IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 1228 OF 2007

The Mahalakshmi Glass Works Pvt.Ltd. ...Petitioner
V/s.
State of Maharashtra & Ors. ...Respondents

Mr.C.U. Singh with Mr.R.S. Pai and Ms.Sanika Deshpande and Mr.Niranjan Mogare i/b. M/s.Haresh Mehta & Co. for the Petitioner.
Mr.L.T. Satelkar, AGP for Respondent Nos.1 and 2.
Mr.M.D. Nagle for Respondent No.3.
Mr.K.P. Anilkumar for Respondent No.4.
Ms.A.P. Gurav for Workmen.

CORAM : V.M. KANADE, J.

DATED : JUNE 29, 2007

P.C. :-

1. By this petition, the petitioner is challenging order dated 18.11.2006 passed by the Commissioner of Labour, Maharashtra State, Mumbai, under Section 25-O(5) and Order dated 8th May, 2007 passed by the Industrial Tribunal in Reference (IT) No.64/2006 under Article 226 of the Constitution of India.

2. Rule. Rule is made returnable forthwith by consent of parties.

FACTS :

3. The petitioner is the company registered under the Companies Act and was engaged in manufacturing glass containers of various shapes and sizes at its factory at Mahalaxmi.

4. It is the case of the petitioner that on account of rise in prices of Light Diesel Oil and furnace oil which is used in the said manufacturing of glass containers and also on account of high operational costs, it was not possible to carry out the manufacturing activity and the company could not generate enough income and therefore, the company became financially unviable and in the financial year ending 31.3.2006, the petitioner incurred a loss of Rs.4 crores.

5. The petitioner, therefore, filed an application under Section 25-O of the Industrial Disputes Act on 8.5.2006 seeking permission to close down its undertaking i.e. a factory at Mahalaxmi with effect from 6.8.2006. The petitioner set out the various

circumstances creating the financial break down of the company. The Union filed its reply and opposed the said application. The second respondent - Commissioner of Labour granted permission to the petitioner to close down the establishment at Mahalaxmi by its order dated 29.7.2006. It is the case of the petitioner pursuant to the closure, the services of the workmen were terminated by order dated 31.7.2006.

6. Thereafter, the Union filed an application dated 1.8.2006 seeking review of the order dated 29.7.2006 and the respondent no.4 also filed an application dated 28.8.2006. The company opposed the application for review/reference filed by the third respondent and the fourth respondent.

7. The second respondent, however, passed an order dated 18.11.2006 and referred the dispute for adjudication to the Industrial Tribunal, Mumbai.

8. The Industrial Tribunal after the matter was referred by the 2nd respondent, issued notices to the

petitioner and the third and fourth respondent and passed order on 8.5.2007 and directed the petitioner to file the statement of claim.

9. The petitioner being aggrieved by the order which is passed by the 2nd respondent dated 18.11.2006 and the order passed by the Tribunal dated 8.5.2007 directing the petitioner to file its statement of claim, has filed this petition under Article 226 of the Constitution of India.

SUBMISSIONS :

10. The learned Senior Counsel for the petitioner Shri C.U. Singh submitted that while passing the order under review, the 2nd respondent had not passed a reasoned order and had merely referred the matter to the Industrial Court. He submitted that the 2nd respondent had instead of reviewing its earlier order, had referred the entire application to the Industrial Tribunal and therefore, had committed an error of law which is apparent on the face of record since it was not open for

the second respondent to refer the entire application for reference before the Industrial Tribunal. He then submitted that the Industrial Tribunal had erred in observing in para 6 of the order that the 2nd respondent had reviewed its earlier order and had recalled the said order. He submitted that the Industrial Tribunal had, therefore, held that initial order granting permission to close down did not exist. He submitted that this observation and finding was contrary to the provisions of Section 25-O and it was not open for the Industrial Tribunal to have come to the conclusion that the earlier order of closure had been recalled or that the said order did not exist. He then submitted that the Industrial Tribunal had erred in directing the petitioner to file the statement of claim by holding that the burden of proof was on the company to establish that there were sufficient grounds in existence for the closure of the company. He invited my attention to the order passed by the 2nd respondent in the review application and submitted that the second respondent had merely referred the matter to the Industrial Tribunal and therefore, the earlier order had not been set aside.

He invited my attention to the provisions of Section 25 Subclause 2, Subclause 4 and Subclause 5. He submitted that as held down under Section 25-O Subclause 4, the order passed by the appropriate authority had become final and since the order was not reviewed or recalled by the said authority, it could not be said that the order was not in existence. He further submitted that since the reference was made at the instance of the workmen, the burden of proof of establishing the fact that grounds of closure of Unit did not exist, were on the workmen. In support of the said submission, he relied on the Division Bench judgment of this Court in the case of **Narang Latex and Dispersions Pvt.Ltd. V/s. S.V. Suvarna (Mrs.) & Anr. reported in 1994 II CLR Page 51** wherein the Division Bench of this Court after relying on the Division Bench Judgment of Allahabad High Court had held that the burden of leading evidence first was on the workman in the case where services of the workman were terminated after the domestic enquiry. He also relied on the judgment of the Apex Court in the case of **Orissa Textile and Steel Limited V/s. State of Orissa and others reported in (2002) 2 SCC Page 578** and

more particularly, on para 16 of the said judgment in support of his submission that the appropriate Government was duty bound to pass a reasoned order while exercising its quasi judicial function under Sub-section 5 of Section 25-0. He submitted that the second respondent had merely recorded the submissions of the Counsel for the company and the Union and had thereafter referred the matter to the Industrial Tribunal. He submitted that therefore, the order had not been recalled but only a reference had been made.

11. Shri Anilkumar, learned Counsel appearing on behalf of the respondent, on the other hand, submitted that the second respondent had referred the matter to the Tribunal and the Tribunal was required to decide the dispute afresh and therefore, it had rightly held that the burden of proof was on the company to prove that adequate grounds for the closure of the unit existed and therefore, had rightly directed the company to file its statement of claim. He submitted that in this context, the Industrial Tribunal had used the word "Recall" in para 6 of the order.

12. Ms.Purav, learned Counsel appearing for the workmen relied on the judgment of this Court in **Britannia Industries Limited V/s. Maharashtra Kamgar Union & Anr. reported in 2005 I CLR Page 278** in support of her submission.

13. Shri C.U. Singh, learned Senior Counsel appearing on behalf of the company, however, pointed out that this order was challenged in appeal and the Division Bench of this Court had permitted the petitioner to withdraw the petition and had observed that in view of the withdrawal of the petition, order passed in the said petition in Britannia Industries Limited was also recalled. He submitted that therefore, the ratio of the said judgment could not be relied upon by the Counsel for the workers.

FINDINGS AND CONCLUSION :

14. Having heard the respective counsel appearing for the parties, in my view, the following points fall

for consideration before this Court :

1) Whether the order passed by the second respondent on the review application amounts to setting aside its earlier order of granting permission of closure dated 29.7.2006 ?

2) Whether by virtue of impugned order dated 18.11.2006, the earlier order passed by the same authority dated 29.7.2006 is recalled ?

3) Whether in the cases where the appropriate Government initially grants permission of closure under Section 25 Subclause 2 and thereafter when the review application which is taken out by the workmen, the appropriate authority refers the matter to the Industrial Tribunal, then in such a case whether burden of proof lies on the company or on the Union ?

15. In order to decide the rival submissions made by the learned Counsel for the Company and the Workmen and

the Union, it would be necessary to consider the necessary provisions of Section 25-O. Section 25-O reads thus :-

> 25-O. **Procedure for closing down an undertaking.-** (1) An employer who intends to close down an undertaking of an industrial establishment to which this Chapter applies shall, in the prescribed manner, apply, for prior permission at least ninety days before the date on which the intended closure is to become effective, to the appropriate Government, stating clearly the reasons for the intended closure of the undertaking and a copy of such application shall also be served simultaneously on the representatives of the workmen in the prescribed manner :
>
> . Provided that nothing in this sub-section shall apply to an undertaking set up for the construction of buildings, bridges, roads, canals, dams or the other construction work.
>
> (2) Where an application for permission has been made under sub-section (1), the appropriate Government, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen and the persons interested in such closure may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the general public and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.

(3) Where an application has been made under sub-section (1) and the appropriate Government does not communicate the order granting or refusing to grant permission to the employer within a period of sixty days from the date on which such application is made, the permission applied for shall be deemed to have been granted on the expiration of the said period of sixty days.

(4) An order of the appropriate Government granting or refusing to grant permission shall, subject to the provisions of sub-section (5), be final and binding on all the parties and shall remain in force for one year from the date of such order.

(5) The appropriate Government may, either on its own motion or on the application made by the employer or any workman, review its order granting or refusing to grant permission under sub-section (2) or refer the matter to a tribunal for adjudication :

. Provided that where a reference has been made to a Tribunal under this sub-section, it shall pass an award within a period of thirty days from the date of such reference.

(6) Where no application for permission under this sub-section (1) is made within the period specified therein, or where the permission for closure has been refused, the closure of the undertaking shall be deemed to be illegal from the date of closure and the workmen shall be entitled to all the benefits under any law for the time being in force as if the undertaking had not been closed down.

(7) Notwithstanding anything contained in the foregoing provisions of this section, the appropriate Government may, if it is satisfied that owing to such exceptional circumstances as accident in the undertaking or death of the

> employer or the like, it is necessary so to do, by order, direct that the provisions of sub-section (1) shall not apply in relation to such undertaking for such period as may be specified in the order.
>
> (8) Where an undertaking is permitted to be closed down under sub-section (2) or where permission for closure is deemed to be granted under sub-section (3), every workman who is employed in that undertaking immediately before the date of application for permission under this section, shall be entitled to receive compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months."

16. From the perusal of the aforesaid section, it could be seen that in a case where company seeks permission for the closure of its establishment which has to apply to the appropriate Government and supply the relevant material alongwith its application for the purpose of proving its necessity for the closure of its unit, the workers also have a right to oppose the said application. After the said application is decided, a review can be filed before the same authority and while deciding the review application, the appropriate Government has to reconsider the entire case and decide the review application by passing a reasoned order.

Under Sub-section 5 of Section 25-O, an option, however is given to the authority either deciding the review application on its own or to refer the matter for adjudication by a judicial Tribunal viz. the Industrial Tribunal. Sub-section 4 of Section 25-O mentions that the order passed by the appropriate authority is final and binding on all the parties subject to provisions of Sub-section 5. This obviously means that after initially an order is passed by the appropriate authority under Sub-section 2 of Section 25-O and thereafter after having exercised the option of review or reference after such orders are passed, the order passed by the appropriate authority would become final.

17. The Apex Court had an occasion to consider the provisions of amended Section 25-O in the case of **Orissa Textile and Steel Limited (supra)** and while examining the said provision and more particularly, Sub-section 5 of amended section 25-O, the Apex Court has clearly observed that while exercising the powers of review, the appropriate Government was performing the quasi judicial function and as such it was under an obligation to give

an opportunity of hearing to the employer, workmen and all interested persons and to pass a reasoned order in writing.

18. In the present case, after the review application was filed by the workman, the respondent no.2 in its order dated 18.11.2006 has recorded submissions which are made by the Counsel for the company and the counsel for the workmen and the Union and thereafter, has observed that it was of the opinion that the questions raised by the parties were questions of fact and law and therefore, it thought it fit to refer the matter to the Tribunal for the proper adjudication of these factual and legal issues raised by the parties. It would be, therefore, relevant to note the observation made by the respondent no.2 while disposing of the review application.

> 9. I have gone through the documents submitted by all the parties concerned. I am of the opinion that matter involves question of law and question of fact which requires judicial scrutiny. I therefore, pass the following order :

O R D E R

. The matter in the application dt. 3.6.2006 filed by M/s. Mahalaxmi Glass Works Pvt.Ltd., Dr.E. Moses Road, Post Box No.6251, Mumbai - 400 011 seeking closure permission of its industrial undertaking situated at the above mentioned address filed under Section 25-O(1) of the Industrial Disputes Act, 1947 is hereby referred under Section 25-O(5) of the said Act to the Industrial Tribunal consisting of Shri A.V. Deshpande.

Place : Mumbai
Dated

Sd/-
(B.D. Sanap)
Commissioner of Labour
Maharashtra State
Mumbai."

19. It is evident from the said order that the respondent no.2 had not exercised the option of reviewing its earlier order dated 29.7.2006 but thought it fit to refer the matter to the Industrial Tribunal for a judicial adjudication of the dispute and therefore, had exercised the other option of referring the matter for judicial scrutiny. It cannot, therefore, be said that by the said order, he had recalled his earlier order dated 29.7.2006. The fact, however, remains that having exercised the option which was given to him under the said provision under Section 25-O Sub-section 5, the matter was referred for adjudication

before the Tribunal and therefore, it cannot be said that he had recalled his earlier order however, the net effect of the reference which was made by the respondent no.2 was that the entire dispute was to be adjudicated by the Tribunal afresh. The submissions made by the learned Counsel Shri C.U. Singh, therefore, cannot be accepted and the first two questions are, accordingly, answered.

20. The next question which falls for consideration is regarding the burden of proof. It is well settled principle in law that initially burden of proving the fact lies on the person who asserts the said facts. In the present case, the matter has been referred for adjudication by a judicial Tribunal. It, therefore, cannot be argued that merely because a quasi judicial authority viz. the appropriate Government having held that there were adequate reasons for the closure of the unit and had granted permission for the closure of the unit, in view of the specific provision of Sub-section 5 of Section 25-O, the Tribunal is not authorised to adjudicate the dispute afresh. That being the position,

in my view, initial order which is passed by the authority under Sub-section 2 of Section 25-O, therefore, is in a way kept in cold storage or is kept in abeyance and the judicial Tribunal is required to adjudicate on the said issue afresh. If the relevant provision is harmoniously construed, then in that event, this can be the only proper interpretation which can be given to the said provision laid down in Sub-section 5 of Section 25-O. That being the case, the company, therefore, will have to establish before the judicial Authority that sufficient grounds existing for the purpose of seeking permission for the closure of the unit and consequently, the burden of proving this fact would squarely lie on the company and not on the workmen. The learned Counsel for the petitioner has relied on the judgment of the Division Bench in the case of **Narang Latex and Dispersions Pvt.Ltd. (supra)**. In my view, the ratio of the said judgment will not apply to the facts of the present case. In the said case, the Division Bench was required to consider the question of burden of proof in a case where the fairness or otherwise of the domestic inquiry was to be determined,

particularly, since the domestic inquiry had culminated in an order of dismissal which was passed by the company against the workman. In this context, the Division Bench after relying on the Division Bench judgment of the Allahabad High Court in a case of **Airtech (Pvt.) Ltd. v. State of U.P. 1984 (49) FLR 38** and also of the Division Bench judgment of this Court in the case of **V.N.S. Engineering and Services Company v. Industrial Tribunal, Goa, Daman and Diu, reported in 1987 II L.L.N. 968** and after referring to the facts of the said case, the Division Bench then considering the aforesaid two Division Bench judgments, finally held that the burden of proof was on the workman to prove that the domestic inquiry was not fair since it felt that the reference having been made at the instance of the workman and he having alleged that his dismissal was wrongful and in that context it held that the party which comes before the Court alleging that the inquiry was not fair and proper alone had to prove initially the said fact. What is material, therefore, is not terminology which is used in either the order of reference which is made nor the manner and the form in which the reference is worded

ultimately. What has to be seen is not the form but the substance of the order of reference in the present case. In this view of the matter, the ratio of the said matter in **Narang Latex and Dispersions Pvt.Ltd. (supra)** will not apply to the facts of the present case. In my view, the Tribunal had correctly held that the burden of proof of establishing the existence of the ground for the closure of the company shall squarely fall on the company and not on the workmen.

21. In the result, there is no merit in the submission made by the learned Senior Counsel appearing on behalf of the petitioner. The petition, therefore, is dismissed. Rule is discharged. Under the circumstances, there shall be no order as to costs.

22. At this stage, the learned Counsel for the petitioner submits that the matter is kept before the Industrial Tribunal for filing statement of claim. He seeks time till 9th July, 2007 for filing statement of claim. Request is accepted. The petitioner is directed to file statement of claim before the Industrial

Tribunal on or before 9th July,2007.

. Parties to act on the authenticated copy of this order.

(V.M. KANADE, J.)